IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 24, 2008

STATE OF TENNESSEE v. JAMES EDWARD MATHEWS, ALIAS

Appeal from the Criminal Court for Knox County
No. 75808, 76988, 77382, 78262, 81492, 82236, 82662, 84038
Ray L. Jenkins, Judge, and James B. Scott, Special Judge, sitting by designation

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No. E2007-00275-CCA-R3-CD - Filed February 4, 2009

Appellant, James Edward Mathews, was indicted by the Knox County Grand Jury in eight separate cases for a total of thirty-eight counts. The charges included burglary of a vehicle, theft, evading arrest and various driving offenses. Appellant subsequently pled guilty to twelve of the charges, for a total effective sentence of fourteen years. The remainder of the charges were either nolle prossed or merged into the other convictions. After a sentencing hearing, the trial court ordered Appellant to serve his sentence in confinement. On appeal, Appellant argues that the trial court should have granted Appellant some form of alternative sentencing. We hold that Appellant's extensive criminal history as well as the past failures of alternative sentencing to deter Appellant from criminal conduct support a sentence of confinement. Accordingly, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgmenst of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and DAVID H. WELLES, J., joined.

Joshua D. Hedrick, Knoxville, Tennessee, for the appellant, James Edward Mathews.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General and Jeff Blevins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 16, 2002, the Knox County Grand Jury indicted Appellant in case number 75808 with one count of theft, three counts of evading arrest, violation of the driver's license law, and three counts of driving on a canceled, suspended, or revoked license. On April 21, 2003, Appellant was indicted by the Knox County Grand Jury in case number 76988 for burglary of a vehicle and theft of property valued at over $500 but less than $1,000. On June 4, 2003, in case number 77382, Appellant was indicted by the Knox County Grand Jury for three counts of driving on a canceled,

suspended, or revoked license, and driving without a license. On October 8, 2003, the Knox County Grand Jury indicted Appellant in case number 78262 for theft of property valued at over $1,000 but less than $10,000 and two counts of evading arrest. On March 22, 2005, in case number 81492, Appellant was indicted for two counts of theft of property valued at more than $500, but less than $1,000. On June 22, 2005, the Knox County Grand Jury indicted Appellant in case number 82236 for three counts of driving on a canceled, suspended, or revoked license and driving without a license. On August 16, 2005, Appellant was indicted in case number 82662 for two counts of driving on a canceled, suspended, or revoked license, driving without a license, speeding, violation of the child restraint law, and failure to provide financial responsibility. Finally, on March 14, 2006, the Knox County Grand Jury indicted Appellant for burglary, four counts of theft, burglary of a vehicle, and possession of burglary tools.

On March 7, 2007, Appellant pled guilty to the following:

Case	Offense	Class	Range	Sentence	Consecutive to
75808[1]	theft	D	II	4 years	
75808	evading arrest	E	II	4 years	
76988	burglary (vehicle)	E	II	2 years	78262, 75808
76988	theft	E	II	2 years	
78262[2]	theft	D	II	4 years	
78262	driving revoked	B mis.		6 months	
84038[3]	burglary	D	I	6 years	81492
84038	burglary (vehicle)	E	II	4 years	
77382[4]	driving revoked	B mis.		6 months	84038
81492[5]	theft	E	II	2 years	76988
82662[6]	driving revoked	B mis.		6 mo.	
82662	financial responsibility			$100 fine	
82236[7]	driving revoked	B. mis.		6 mo.	

[1]The State nolle prossed counts 3, 4, 5, 6, 7, and 8 of this indictment.

[2]The State nolle prossed counts 2 and 3 of this indictment.

[3]The State agreed to nolle prosse counts 2, 3, 5, 6, and 7 of this presentment.

[4]The State agreed to nolle prosse count 4 of this indictment. Counts 2 and 3 were merged with the conviction for driving on a revoked license.

[5]Count 2 of the indictment was merged with the theft conviction.

[6]Count 2 of this indictment was ordered to merge with count 1. The State nolle prossed counts 3, 4, and 5.

[7]The trial court merged counts 2 and 3 of the indictment and the State nolle prossed count 4.

At the plea submission hearing, the trial court explained the terms of the plea agreement to Appellant, who admitted that he was guilty of the offenses. The State offered a statement of proof regarding the offenses. The State commented that if the cases had gone to trial the proof would have shown that in case number 78262, Appellant stole a go-kart valued at over $1,000 from Wal-Mart and evaded arrest in the process. In case number 75808, the proof would have shown that police received a report of a stolen pick-up truck. Several police officers were pursuing Appellant, who was seen driving the truck, when they saw Appellant bail out of the moving truck and run away from the officers on foot. Appellant was eventually captured by police, and he admitted that he was driving the stolen vehicle. In case number 76988, the proof would have shown that Appellant burglarized a vehicle at Home Depot on Centerline Drive in Knoxville. Appellant was seen moving a "bunch of tools out of the victim's van" into "the passenger compartment of a dark colored Toyota Camry." In case number 84192, the proof would have shown that Appellant took a tool box valued at between $800 and $1,000 from a truck bed in the Home Depot parking lot. Employees of the store got Appellant's tag number and were able to identify him by sight. In case number 84038, the State informed the trial court that the proof would show that the Knoxville Police received a call of a burglary in progress at a building owned by Todd Napier. When police arrived, they found a hair dryer and floor jack that were being used by Appellant to break into the building. Witnesses across the street identified Appellant as the perpetrator. Appellant was found in a nearby area and admitted his involvement when he was arrested. Appellant had also removed items from a pick-up truck located in the area. Appellant agreed that the State's summarization of the facts was accurate.

The trial court held a hearing on July 13, 2007, to determine the manner of service of the sentence. At the hearing, the State introduced Appellant's presentence report and two reports from the Knox County Sheriff's Department Community Alternatives to Prison Program ("CAPP"). The CAPP reports indicated that Appellant was "not appropriate" for placement on CAPP because of his six prior felony convictions and twenty-seven misdemeanor convictions. Additionally, as set forth in the CAPP reports, Appellant was revoked from CAPP in 2000 and has a prior revocation from parole. According to the presentence report, Appellant has at least thirty-three prior convictions dating back to 1984. The trial court made the following statement, "[I]t . . . appears to me that this man is not a proper subject for any relief at this time in this court."

Appellant appealed, challenging the trial court's denial of an alternative sentence.

Analysis

Appellant contends on appeal that the trial court erred by denying an alternative sentence. Specifically, Appellant argues that the trial court failed to make findings of fact on the record that would support the presumption of correctness ordinarily utilized by this Court on appeal. Thus Appellant urges this Court to review the record de novo with no presumption of correctness. Appellant asks this Court to remand the case to the trial court for further proceedings, specifically a hearing on the issue of manner of service of the sentence. The State agrees that the trial court erred by failing to make findings of fact on the record. However, the State argues that under a de novo review there is sufficient evidence in the record to support a denial of an alternative sentence.

"When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of showing that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). With certain exceptions, a defendant who committed offenses prior to June 7, 2005, is eligible for probation if the sentence actually imposed is eight years or less. T.C.A. § 40-35-303(a) (2003). For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. *See* T.C.A. § 40-35-303(a) (2005).

All offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[T]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein pled guilty to four counts of theft, one count of evading arrest, two counts of burglary of a vehicle, four counts of driving on a revoked license, one count of burglary, and one count of failure to provide financial responsibility, all Class C, D, or E felonies or misdemeanors. All of the offenses herein except for burglary and burglary of a vehicle in case number 84038 were committed prior to June 7, 2005. He was sentenced to less than ten years in incarceration for those crimes and less than eight years in incarceration for the crimes occurring prior to June 7, 2005. Therefore, he is eligible for alternative sentencing including probation. *See* T.C.A. §§ 40-35-102(6), -303(a) (2003, 2005) & -303(a). However, we point out that the above considerations are advisory only for the offenses occurring on or after June 7, 2005. *See* T.C.A. § 40-35-102(6) (2005). Further, Appellant is not presumed a favorable candidate for alternative sentences for the early offenses due to his status as a Range II multiple offender. T.C.A. § 40-35-102(6).

We have reviewed the record on appeal and find that the trial court apparently did not consider the sentencing principles and all pertinent facts in the case. Therefore, there is no presumption of correctness in the findings of the trial court, and we will review Appellant's sentence de novo.

With regard to Appellant's prior record, the presentence report shows a lengthy criminal history. Appellant's criminal history begins with a conviction in 1984, when he was twenty-one years old. Appellant has amassed a substantial criminal history, with at least thirty-three prior convictions, including six felonies. Appellant's record includes convictions for petit larceny, attempted burglary, grand larceny, shoplifting, receipt of stolen property, criminal trespass, reckless endangerment, assault, criminal impersonation, theft, vandalism, and numerous drug-related offenses. Appellant's criminal record alone supports the denial of alternative sentencing. *See* T.C.A. § 40-35-103(1)(A). Further, measures less restrictive than confinement have frequently been applied unsuccessfully to Appellant. The record indicates that he has been previously revoked from

parole and CAPP. Appellant's failure to abide by a previously granted alternative sentence further supports the denial of an alternative sentence in this case. *See* T.C.A. § 40-35-103(1)(C). Consequently, we affirm the judgment of the trial court ordering Appellant to serve his sentences in incarceration.

Conclusion

For the foregoing reasons, we affirm the judgments of the trial court.

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JERRY L. SMITH, JUDGE